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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. FRANK M. SULLIVAN, Defendant and Appellant.	A144708 (Sonoma County Super. Ct. No. SCR593297)

This is an appeal from the trial court's order denying the petition for resentencing filed by defendant Frank M. Sullivan pursuant to Proposition 47, the Safe Neighborhoods and Schools Act of 2014. Defendant was sentenced to a total prison term of 15 years, four months after entering a guilty plea to eight felony counts of second-degree burglary and admitting one prior serious felony conviction. On appeal, defendant contends the trial court committed reversible error when finding that his theft offenses were not subject to reclassification as misdemeanors under the newly-enacted Proposition 47 framework. For reasons set forth below, we agree and, thus, reverse.

FACTUAL AND PROCEDURAL BACKGROUND

On August 5, 2011, defendant entered a guilty plea to eight counts of second degree burglary (Pen. Code, § 459), enhanced for a prior serious felony conviction for first degree burglary pursuant to Penal Code section 1170.12.[1]

[1] Unless otherwise stated, all statutory citations herein are to the Penal Code.

This plea agreement was based on the following information contained within the Sonoma County felony presentence report. Counts one and two stemmed from the following incidents on October 15, 2010. With respect to count two, in the early afternoon, a store video surveillance system captured defendant enter Raley's in Windsor, walk directly to the backroom, and then exit the store carrying what appeared to be a day planner. Store employee J.R. later reported that she kept her day planner in a bag in a room in the back of the store that was accessible to customers.

Later that day, at about 3:23 p.m., police were dispatched in response to a petty theft report at KC's Downtown Grill in Windsor. The victim, S.F., later identified defendant as the person that entered the restaurant at about 10:40 a.m. claiming to need to check the fire sprinkler system. S.F. escorted him to the kitchen area, where defendant appeared to be inspecting the sprinklers before leaving without notifying anyone. Several hours later, S.F. realized that her purse, left in the kitchen area, was missing. She later found it in the walk-in refrigerator, missing, among other things, her wallet with credit cards, identification, ATM card, and checkbook. S.F. subsequently learned that someone had used her credit card over the next few days to buy gas and a carwash at Shell for a Toyota 4-Runner for $57.60, and food for $19.07 at Jack in the Box restaurant; to withdraw $300 in cash in Sonoma with her ATM card; and to cash one of her checks for $161.43 at Raley's. Over the next few weeks, someone wrote checks bearing her name for $37.03 at CVS and $55.91 to an unknown payee.

Counts three and four stemmed from the following incidents. At approximately 9 p.m. on October 18, 2010, Healdsburg police officers were dispatched to the Flying Goat Coffee shop. Employee B.B. reported that the previous day, a man later identified as defendant entered the shop with a camera asking to speak with the owners regarding a sprinkler system he was allegedly hired to install. B.B. believed him and took him to an employee area containing storage shelves and lockers. Later that day, B.B.'s coworker, J.W., found her purse missing from these shelves, and thereafter found it in a nearby storage room, missing her identification cards, cash and debit cards. B.B. had not seen defendant leave. J.W. later learned that her debit card had been used on October 17 to

buy $44.51 worth of gas at the Fast Lane Gas Station (while a separate $12.80 charge for cigarettes was denied). A video surveillance system revealed the presence of a Toyota 4-Runner at the gas pump.

With regards to count five, a Santa Rosa police officer was dispatched to the Liv Fashion Boutique in response to a theft report at about 12:44 p.m. on November 15, 2010. The victim, J.M., told the officer that a man later identified as defendant in a hooded sweatshirt had entered the store an hour earlier and told her that he needed to conduct a safety check that included inspection of the fire sprinkler system and rear exit door. J.M. was suspicious and advised him there was no rear exit or sprinkler system. Defendant responded that he nonetheless had to check the building and walked toward a rear storeroom. He remained in the room about three minutes before leaving quickly with his sweatshirt draped over his arm, telling her a colleague would return in a few days to inspect the exposed pipes. When J.M. subsequently went to the rear storeroom, she immediately realized her designer purse, worth $1,500, was missing, as well as a wallet worth $800, $10 in cash, credit cards, identification cards or licenses, and sunglasses worth $325. Defendant later admitted taking these items, and using J.M.'s credit card to purchase gas at a 76 Station.

With regards to count seven, a police officer was dispatched to the Tres Hombres restaurant at about 5:08 p.m. on November 28, 2010, where the manager reported that a man later identified as defendant had been chased away by staff after stealing the purse of an employee. Defendant dropped the purse, valued by the victim at over $1,000, while fleeing. The manager further reported that defendant had been picked up in a white Toyota 4-Runner (driven by co-defendant Carrie Leenerts), which police later located parked in a nearby lot with two female occupants inside. The officer found defendant hiding in nearby mud a short while later, and detained and arrested him.

With regards to count 11, on the morning of October 22, 2010, defendant entered into the Gamestop store and told employee E.H. that he needed to examine the back office's fire sprinkler system. She agreed. A brief moment later, defendant left the store, telling her someone would return the next day to follow up on the inspection. Later that

day, E.H. discovered her wallet, containing her credit card, was missing from her purse. After contacting her bank, E.H. discovered that about $1,500 in fraudulent charges had been made with her credit card.

Finally, with respect to count 12, a Santa Rosa police officer was dispatched to the Oakmont Village Market in response to a burglary report at about 6:30 p.m. on October 29, 2010. The victim, S.S., told the officer that a man later identified as defendant had entered the store and told her that he needed to check the building in regards to a request for his company to install fire extinguishers. With her consent, defendant then went in the store's kitchen area holding a jacket over his arm. S.S. later discovered that her purse was missing, which had contained her keys, $60 in cash, a $160 camera, $50 prepaid Visa card, debit card, credit card, and driver's license. Another store employee, E.C., likewise discovered missing her purse, keys, wallet valued at $20, identification card, driver's license, social security card, a can of mace, and three pairs of earrings valued at $25.[2]

After denying defendant's motion pursuant to *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*), the trial court sentenced him to an aggregate prison term of 15 years, four months, representing the aggravated three-year term for count one, doubled to six years for the prior Strike, and consecutive 16-month terms (one-third the middle term) for each remaining count. We affirmed this judgment in a nonpublished decision, A133784, filed on May 15, 2012.

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[2] Defendant agreed to a *Harvey* waiver with respect to count 10, which stemmed from a warrant search executed at a Sonoma County address associated with him on November 29, 2010. During this search, officers recovered numerous pieces of stolen property, including, among other things, a woman's wallet, as well as checks, credit and debit cards, and identification cards in several women's names. Defendant later took responsibility for the presence of these stolen items, insisting that K.B., the occupant of the residence, had nothing to do with it.

On January 13, 2015, defendant filed a petition for resentencing in accordance with Proposition 47, the Safe Neighborhoods and Schools Act of 2014.[3] At the contested hearing on his petition, defendant argued pro per that most or all of the counts to which he pleaded no contest are theft offenses not exceeding the $950 statutory threshold and, as such, qualify as misdemeanors under the newly enacted section 1170.18. In addition, defendant asked the court to appoint counsel to investigate the specific value of the property stolen with respect to each count. The prosecutor, in turn, opposed the petition, arguing: "None of the conviction offenses involved theft of goods from customer areas but, rather, theft of employees[']s wallets from employee areas while defendant posed as a fire inspector to gain access." The trial court denied defendant's petition on January 28, 2015. Defendant thereafter filed a timely notice of appeal.

DISCUSSION

Defendant contends the trial court erred in finding that Proposition 47 does not apply to his second-degree burglary offenses for purpose of resentencing relief because he stole property from employees in nonpublic areas of commercial establishments rather than from customer areas. According to defendant, thefts, like his, of employee property valued at less than $950 during regular business hours at commercial establishments qualify as "petty thefts" and, thus, may serve as the basis of Property 47 relief. We agree.

We review de novo questions of statutory or voter-initiative interpretation. (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1212 [rules of statutory interpretation apply to voter initiatives]; *Argaman v. Ratan* (1999) 73 Cal.App.4th 1173,

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[3] Proposition 47 created a new provision, section 1170.18, which permits a defendant to petition for relief upon reclassification of certain felony offenses as misdemeanors. Subdivision (f) provides that "[a] person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors." (§ 1170.18, subd. (f).) Further, where the section 1170.18 applicant has satisfied the criteria in subdivision (f), the trial court "shall designate the felony offense or offenses as a misdemeanor." (§ 1170.18, subd. (g).)

1176.) The fundamental rule of such construction is that we must ascertain the intent of the electorate or legislature so as to effectuate the purpose of the law. (*People v. Murphy* (2001) 25 Cal.4th 136, 142.) "To determine the intent of legislation, we first consult the words themselves, giving them their usual and ordinary meaning. [Citations.]" (*DaFonte v. Up-Right, Inc*. (1992) 2 Cal.4th 593, 601.) "We do not, however, consider the statutory language in isolation; rather, we look to the entire substance of the statutes in order to determine their scope and purposes. [Citation.] That is, we construe the words in question in context, keeping in mind the statutes' nature and obvious purposes. [Citation.] We must harmonize the various parts of the enactments by considering them in the context of the statutory frame work as a whole. [Citation.] If the statutory language is unambiguous, then its plain meaning controls. If, however, the language supports more than one reasonable construction, then we may look to extrinsic aids, including the ostensible objects to be achieved and the legislative history. [Citation.]" (*People v. Cole* (2006) 38 Cal.4th 964, 975.)

Here, defendant contends his felony theft offenses qualify for purposes of Proposition 47 as "shoplifting" or "petty theft" (to wit, theft of one or more items not exceeding $950 in value) and, as such, are eligible to be reclassified by the court as misdemeanors for purposes of sentencing relief. (§ 459.5; § 490.2.) In responding to his contention, we first look to the operative legal framework.

"On November 4, 2014, the voters of California passed Proposition 47, reducing some felony theft- and forgery-related offenses to misdemeanors when the value of the stolen property does not exceed $950. (E.g., §§ 459.5, subd. (a) [redefining some theft as shoplifting], 490.2, subd. (a) [redefining some grand theft as petty theft], 473, subd. (b) [changing punishment for some forgery and counterfeiting offenses].) The initiative also created a resentencing procedure allowing offenders to petition for resentencing if they are "currently serving a sentence for a conviction" for committing a felony and "would have been guilty of a misdemeanor under" the provisions added by Proposition 47. (§ 1170.18, subd. (a).)" (*People v. Abarca* (2016) 2 Cal.App.5th 475, 479.) Thus, "[Proposition 47] 'reduces penalties for certain offenders convicted of nonserious and

nonviolent property and drug crimes' and 'allows certain offenders who have been previously convicted of such crimes to apply for reduced sentences.' (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) analysis of Prop. 47 by Legis. Analyst, p. 35 (Ballot Pamphlet).) . . . The purpose of this and other similar changes was 'to ensure that prison spending is focused on violent and serious offenses [and] to maximize alternatives for nonserious, nonviolent crime.' (Ballot Pamphlet, *supra*, text of Prop. 47, § 2, p. 70.)" (*In re J.C.* (2016) 246 Cal.App.4th 1462, 1469.) To this end, Proposition 47 "(1) added chapter 33 to the Government Code (§ 7599 et seq.), (2) added sections 459.5, 490.2, and 1170.18 . . . , and (3) amended . . . sections 473, 476a, 496, and 666 and Health and Safety Code sections 11350, 11357, and 11377. (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, §§ 4–14, pp. 70–74.)" (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091.)

Defendant petitioned the court for relief in propria persona, citing section 1170.18, a new provision added by Proposition 47 that authorizes a "person [currently] serving a sentence for a conviction . . . [to] petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act." (§ 1170.18, subd. (a).) Both section 459.5 and 490.2 are relevant here.

Section 459.5 provides in pertinent part, "Notwithstanding Section 459, shoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950). Any other entry into a commercial establishment with intent to commit larceny is burglary. Shoplifting shall be punished as a misdemeanor, except that a person with one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 . . . may be punished pursuant to subdivision (h) of Section 1170." (§ 459.5, subd. (a).) Section 490.2, in turn, provides in

pertinent part, "Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor." (§ 490.2, subd. (a).)

As it did below, the Attorney General argues we should apply the common understanding of "shoplifting," which it defines as "only the theft of openly displayed merchandise from commercial establishments," and not, as here, "personal property belonging to employees after [defendant] had entered nonpublic areas of the establishments[.]" The trial court accepted this argument. Our colleagues in Division One of this Appellate District, however, recently rejected a variation of this argument in a case considering whether a private golf and country club constitutes a "commercial establishment" for purposes of Proposition 47 relief. There, the defendant was convicted of stealing the private club's television worth "$650, $670" and at "least three boxes" of personalized golf balls worth $50 each and, similar to here, the Attorney General argued the defendant's criminal conduct did not constitute "shoplifting" within the meaning of section 459.5. (*People v. Holm* (2016) 3 Cal.App.5th 141, 146-147.) We find our colleagues' detailed analysis in this case persuasive:

" 'Several recent decisions have considered the meaning of "commercial establishment" as used in section 459.5. In [In re] *J.L., supra, 242 Cal.App.4th 1108*, for example, the court considered whether a public school was a "commercial establishment" within the meaning of the statute. "Giving the term its commonsense meaning, a commercial establishment is one that is primarily engaged in commerce, that is, the buying and selling of goods or services. That commonsense understanding accords with dictionary definitions and other legal sources. (Webster's 3d New Internat. Dict. (2002) p. 456 ['commercial' means 'occupied with or engaged in commerce' and 'commerce' means 'the exchange or buying and selling of commodities esp. on a large scale']; The Oxford English Reference Dict. (2d ed. 1996) p. 290 [defining 'commerce' as 'financial transactions, esp. the buying and selling of merchandise, on a large scale']; Black's Law Dict. (10th ed. 2014) p. 325 ['commercial' means '[o]f, relating to, or involving the

buying and selling of goods; mercantile']; see also 37 C.F.R. § 258.2 (2015) [copyright regulation defining the term 'commercial establishment' as 'an establishment used for commercial purposes, such as bars, restaurants, private offices, fitness clubs, oil rigs, retail stores, banks and financial institutions, supermarkets, auto and boat dealerships, and other establishments with common business areas']; Gov. Code, § 65589.5, subd. (h)(2)(B) [defining 'neighborhood commercial' land use as 'small-scale general or specialty stores that furnish goods and services primarily to residents of the neighborhood'].)' (*In re J.L., supra, 242 Cal.App.4th at p. 1114*.)" (*People v. Holm, supra,* 3 Cal.App.4th at pp. 146-147.)

" 'Applying these definitions of "commercial," the *J.L.* court concluded "[a] public high school is not an establishment primarily engaged in the sale of goods and services; rather, it is an establishment dedicated to the education of students." (*In re J.L., supra,* 242 Cal.App.4th at p. 1114.) [¶] In *People v. Hudson* (2016) 2 Cal.App.5th 575, 579-583 [206 Cal.Rptr.3d 336], the court applied the same definition of "commercial establishment" and held a commercial bank is such an establishment. "Because 'commercial' involves being engaged in commerce, including financial transactions, we conclude that the term 'commercial establishment' includes a bank." (*Id.* at p. 582.) While the court acknowledged "a common understanding of the word 'commercial' encompasses the buying and selling of merchandise in a retail establishment," it went on to observe "nothing in the text of the Act supports this narrow interpretation and we reject it." (*Ibid.*; see also *People v. Abarca* (2016) 2 Cal.App.5th 475, 480-483 [205 Cal. Rptr. 3d 888] [bank is "commercial establishment"]; *People v. Smith* (2016) 1 Cal.App.5th 266, 272-273 [204 Cal. Rptr. 3d 425] [check-cashing business is "commercial establishment"]; cf. *People v. Stylz* (2016) 2 Cal.App.5th 530, 533 [206 Cal. Rptr. 3d 301] [locked storage unit was not "commercial establishment"].)' " (*People v. Holm, supra,* 3 Cal.App.4th at p. 147.)

" 'We also agree with the definition of 'commercial establishment' applied in these cases. Applying it here, we conclude the Santa Rosa Golf and Country Club is an establishment "primarily engaged in the sale of goods and services." The fact most of

these are sold to a subset of the general public — namely individual club members and their guests — does not change the commercial nature of the establishment. Furthermore, the club sells some of its goods and services, namely its banquet space and services, to the general public.' " (*People v. Holm, supra* 3 Cal.App.5th at pp. 146-148.)

Returning to the matter at hand with this analysis in mind, we likewise conclude that the commercial establishments and the property thefts at issue fall within the definition of "shoplifting" criminalized as misdemeanors under section 459.5. In particular, contrary to the People's argument, the fact that the property stolen during regular business hours by defendant was stored in employee-designated areas and belonged to employees rather than property openly offered for sale to the public does not change this fact. Indeed, in *People v. Holm*, the stolen television was not a publicly-sold retail item but, rather, the property of the private club itself, demonstrating that the stolen nature and value of the property, not its type, location within the commercial enterprise or identity of its owner, are the defining characteristics for purposes of Proposition 47 relief. We thus conclude "shoplifting" under section 459.5 refers to theft of property worth no more than $950 from commercial establishments primarily engaged in the buying and selling of goods or services, regardless of whether the shoplifted property was openly displayed merchandise offered for sale by the establishment or, as here, owned and stored in non-public areas by employees working on the establishment's behalf.[4]

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[4] The California Supreme Court recently rejected an additional argument made by the People here – that, even if we were to conclude defendant engaged in shoplifting after entering the identified commercial establishments, he is still not eligible for resentencing because he entered the commercial establishments intending to commit identity theft or theft by false pretenses rather than shoplifting:
"Section 459.5, subd. (b) requires that any act of shoplifting '*shall be charged* as shoplifting' and no one charged with shoplifting 'may also be charged with burglary or theft *of the same property*.' (Italics added.) A defendant must be charged only with shoplifting when the statute applies. It expressly prohibits alternate charging and ensures only misdemeanor treatment for the underlying described conduct. The statute's use of the phrase 'the same property' confirms that multiple burglary charges may not be based on entry with intent to commit different forms of theft offenses if the property intended to be stolen is the same property at issue in the shoplifting charge. Thus, the shoplifting

Moreover, putting aside for the moment section 459.5, defendant has identified on appeal another basis for revisiting his petition for resentencing. As the California Supreme Court recently clarified: "What section 490.2 indicates is that after the passage of Proposition 47, 'obtaining any property by theft' constitutes petty theft if the stolen property is worth less than $ 950. [Footnote omitted.] Of course, section 487, subdivision (a), already made it grand theft to steal property worth over $ 950. But various other theft provisions carved out separate categories of grand theft based on the type of property stolen, with either a lower value threshold or no value threshold at all. These are the provisions that Proposition 47 modified by inserting a $ 950 threshold. Or as the Legislative Analyst put it: 'This measure would limit when theft of property of $ 950 or less can be charged as grand theft. Specifically, such crimes would no longer be charged as grand theft *solely because of the property involved* . . . .' (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) analysis of Prop. 47 by Legis. Analyst, p. 35, italics added (Voter Information Guide).)"[5] (*People v. Romanowski* (2017) 2 Cal.5th 903, 908 [*Romanowski*].) Further, noting that several theft statutes previously defined categories of grand theft based on the type of property stolen, the California Supreme Court explained that, with enactment of section 490.2, this property-type categorization was

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statute would have precluded a burglary charge based on an entry with intent to commit identity theft here because the conduct underlying such a charge would have been the same as that involved in the shoplifting, namely, the cashing of the same stolen check to obtain less than $ 950." (*People v. Gonzales* (2017) 2 Cal.5th 858, 876-877.)

[5] "Section 487 lists four types of grand theft. First, subdivision (a) makes it grand theft to steal any 'money, labor, or real or personal property . . . of a value exceeding nine hundred fifty dollars ($950).' Next, section 487, subdivision (b) sets a $250 threshold for theft of 'domestic fowls, avocados, olives, citrus or deciduous fruits, other fruits, vegetables, nuts, artichokes, or other farm crops' as well as of 'fish, shellfish, mollusks, crustaceans, kelp, algae, or other aquacultural products . . . from a commercial or research operation which is producing that product.' After that, section 487, subdivision (c) makes it grand theft to steal property 'from the person of another,' and section 487, subdivision (d) makes it grand theft to steal either an 'automobile' or a 'firearm.' In sum, section 487 makes it grand theft to steal more than $950 worth of anything; more than $250 worth of the crops or critters listed in subdivision (b); anything at all from the victim's person; or any cars or guns." (*Romanowski, supra*, 2 Cal.5th at p. 907.)

eliminated to make theft of any type of property with a value less than $950 (including access card theft) punishable as a misdemeanor offense. (*Romanowski*, at p. 908 [concluding that, because section 484e, subdivision (d) defined access card theft as grand theft, it was among those statutes defining grand theft for which Proposition 47 reduced punishment].)

In our case, there is little doubt at least some of defendants' counts meet this broad definition of "petty theft." This is particularly true when we adhere to Proposition 47's mandate that, "This act shall be liberally construed to effectuate its purposes." (2014 Voter Guide, *supra*, text of Prop. 47, § 18, p. 74; *People v. Holm*, *supra*, 3 Cal.App.5th at p. 146.) On the other hand, to interpret sections 459.5 and 490.2 in the narrow manner proposed by the People in order to deny defendant Proposition 47 relief would, we conclude, undermine the voters' stated intent of reducing felonies to misdemeanors for nonserious nonviolent offenses and thereby reducing the costs associated with felony incarcerations. Accordingly, we agree with defendant that Proposition 47 affords him the right to have his convictions for second degree felony burglary reduced to misdemeanor shoplifting or petty theft, unless the trial court determines on remand that the stolen property for a particular count exceeds $950 in value (§§ 459.5, 490.2), or that resentencing would pose an unreasonable risk of danger to public safety (§ 1170.18, subd. (b).)[6]

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[6] The parties disagree on whether the value of particular shoplifted property exceeded $950, as well as which party bears the burden of proof. With respect to the burden of proof, this issue was recently settled by the California Supreme Court: "The ultimate burden of proving section 1170.18 eligibility lies with the petitioner." (*Romanowski, supra*, 2 Cal.5th at p. 916.) However, given the parties' dispute as to whether the stolen property at issue comes within the $950 threshold, we return this matter to the trial court to decide this fact-based issue in the first instance on remand: "In some cases, the uncontested information in the petition and record of conviction may be enough for the petitioner to establish this eligibility. . . . [In other cases, however,] eligibility for resentencing may turn on facts that are not established by either the uncontested petition or the record of conviction. In these cases, an evidentiary hearing may be 'required if, after considering the verified petition, the return, any denial, any affidavits or declarations under penalty of perjury, and matters of which judicial notice

DISPOSITION

The order denying defendant's petition for recall of sentence and request for resentencing is reversed and the matter is remanded to the trial court for further proceedings consistent with this opinion.

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Jenkins, J.

We concur:

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McGuiness, P. J.

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Pollak, J.

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may be taken, the court finds there is a reasonable likelihood that the petitioner may be entitled to relief and the petitioner's entitlement to relief depends on the resolution of an issue of fact.' (Cal. Rules of Court, rule 4.551 (f).)" (*Romanowski, supra*, at p. 916.)